

Huynh (Migration) [2018] AATA 1890 (7 May 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr HUYNH Anh Duyen
CASE NUMBER:	1614602
DIBP REFERENCE(S):	BCC2014/2360789
MEMBER:	Shane Lucas
DATE:	7 May 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2)(a) of Schedule 2 to the Regulations; • cl.820.221 of Schedule 2 to the Regulations; and • r.2.03A

Statement made on 07 May 2018 at 12:15pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – Spouse or de facto of sponsor – Joint liabilities – Joint tenancy agreement – Daily living arrangements – Photographic evidence – Emotional support – Duration of relationship – Registration of relationship – Decision under review remitted

LEGISLATION

Migration Act 1958, ss 5CB, 65

Migration Regulations 1994, rr 1.09A, 2.03A, Schedule 2 cls 820.211, 820.221

CASES

Bretag v MILGEA [1991] FCA 582

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 1 September 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant is a Vietnamese national born on 28 July 1981. He applied for the visa on 18 September 2014 on the basis of his de facto relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cls.820.211(2)(a), and consequently 820.221, because the delegate was not satisfied the applicant was the spouse or de facto partner of the sponsor. The delegate considered that the information and evidence submitted in support of the application was not sufficient to demonstrate that the visa applicant satisfied the definition of spouse or de facto partner under s.5F or s.5CB of the Act.
4. The applicant seeks review of the delegate's decision.
5. The applicant appeared before the Tribunal on 2 May 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor.
6. A further seven witnesses – being members of the couple's friendship network in Australia and relatives of the applicant - made themselves available to provide evidence to the Tribunal. Three of these witnesses were among the seventeen persons who provided the Tribunal with detailed and credible Statutory Declarations attesting to the genuine and continuing nature of the relationship between the sponsor and the visa applicant. Accordingly, the Tribunal determined that it was not necessary to take oral evidence from these witnesses.
7. The applicant was represented in relation to the review by a registered migration agent.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

Relevant law

9. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made (and at the time of decision) the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, the applicant claims to be the de facto partner of the sponsor. The parties provided documentation attesting that the sponsor (born in Stanthorpe, Queensland on 16 November 1970) is an Australian citizen by birth. Accordingly, the sponsor satisfies the requirements of cls.820.211(2)(b) and 820.221.
10. 'De facto partner' is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and

continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).

Are the parties in a de facto relationship?

11. In forming an opinion whether the applicant and sponsor are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship; the nature of the parties' household; and the nature of the parties' commitment to each other as set out in r.1.09A(3).
12. In making its findings about the circumstances of the relationship, the Tribunal has applied the principles espoused in *Bretag v MILGEA [1991] FCA 582* for the purpose of determining whether the relationship is genuine and continuing. In considering the documentation provided to the Tribunal and the oral evidence of the applicant and sponsor, the Tribunal must be satisfied that the parties are in a de facto relationship that is valid for the purposes of the Act as required by s.5CB(2).

CONSIDERATION OF CLAIMS AND EVIDENCE

13. Financial aspects of the relationship

14. The applicant provided the Tribunal with documentation attesting to the couple's financial arrangements. The material included but was not limited to documentation attesting to the couple's joint account with the Commonwealth Bank; utility, telephone and property rental bills in joint names; and documentation pertaining to joint travel to Queensland in July 2015 to attend the funeral of the sponsor's grandmother.
15. The Tribunal also received a written submission from the applicant's representative and received oral evidence from the parties regarding the approach the couple take to meeting their weekly household expenses. As the applicant does not have work rights in Australia, the sponsor is the sole breadwinner in the relationship. The sponsor therefore acquits the household's principal expenses, including rent, utilities and grocery bills.
16. The applicant receives some financial support from his Australian-based relatives, and utilises these moneys to assist in meeting the couple's shared expenses. While the couple do not own real estate, they have jointly purchased a range of household items from the time the applicant moved into the sponsor's rental property in May 2013, and until the time of this decision.
17. On consideration of the evidence, the Tribunal is satisfied that the couple have pooled their financial resources in relation to the sharing of day-to-day household expenses and some major financial commitments (i.e. furnishings, home entertainment systems). The Tribunal is also satisfied that the parties have joint liabilities, specifically through the joint tenancy agreement for their home in Prahran, Victoria.
18. The Tribunal found no evidence that the couple have committed to joint ownership of real estate or other major assets. The Tribunal found no evidence that either party owes any legal obligation in respect of the other, though it is noted that the couple took the step of registering their union with the City of Melbourne on 16 September 2016.
19. The Tribunal is satisfied that the financial aspects of the relationship attest to the genuine and continuing relationship between the parties.
- 20.

21. Nature of the household

22. The applicant and sponsor gave consistent and detailed oral evidence about their daily living arrangements, including their social and recreational routines. The Tribunal is satisfied that the couple live together and share responsibility for the housework, cooking and other domestic duties. The Tribunal is satisfied that the parties have established a joint household. The Tribunal found no evidence of any joint responsibility for the care and support of children.
23. The Tribunal is satisfied that the nature of the parties' household attests to the genuine and continuing relationship between the sponsor and the applicant.

24. Social aspects of the relationship

25. As indicated above, the parties provided statutory declarations from seventeen third parties – including the sponsor's former wife and close relatives of both persons - attesting to the genuine and continuing nature of their relationship. The Tribunal found these declarations to be highly credible in that they portrayed the relationship between the parties in a detailed manner reflecting the unique insights and perspectives of the individual declarants.
26. The applicant also provided a wealth of photographic evidence regarding their social life with an extensive network of friends, and their interaction with members of both parties' families in Australia. The photographs provided showed the applicant and the sponsor together and/or with others in a range of settings, and appeared spontaneous and casual.
27. The applicants also provided a copy of the December 2016-January 2017 edition of *Melbourne*, a City of Melbourne publication, in which the parties were featured as an example of a same-sex couple that choose to register their union on the municipal Relationship Declaration Register.
28. The applicant and sponsor provided oral evidence regarding the sponsor's family's acceptance of and support for their relationship. In oral evidence, the sponsor provided frank and compelling testimony regarding the sometimes confronting aspects of his personal journey and the support he had drawn from family and friends since separating from his wife, revealing his sexuality, and declaring his relationship with the applicant. The applicant also spoke of the support and acceptance he has received from Australian friends and relatives since declaring his relationship with the sponsor.
29. On the basis of the evidence before it, the Tribunal is satisfied that the persons represent themselves to others as being married to each other, and that the couple plan and undertake joint social activities. The Tribunal is also satisfied that the relationship is viewed as genuine and continuing in the opinion of the couple's friends and family.
30. The Tribunal is satisfied that the social aspects of the relationship attest to the genuine and continuing relationship between the parties.

31. Nature of the person's commitment to each other

32. The Tribunal was provided with documentation and oral evidence from the parties attesting that the parties have lived together in Prahran, Victoria for some five years (since May 2013) and registered their relationship with the City of Melbourne in September 2016. Both in Statutory Declarations provided to the Tribunal and in their oral evidence, the couple displayed substantial knowledge about each other's personal histories, character, current circumstances and future aspirations. The couple gave frank and credible evidence

regarding the development of their relationship over time, the companionship and emotional support they provide each other, and their mutual reliance.

33. In oral evidence, the sponsor gave a detailed and compelling account of the emotional support the visa applicant has provided him as he has learned to become comfortable with his identity as a gay man, and has worked through the sometimes difficult process of revealing his sexuality to his elderly parents. Both parties also spoke of the emotional support each has provided the other on occasions when close family members have died away, specifically at the time of the visa applicant's godmother's death in December 2015, and at the time of the sponsor's grandmother's passing in July 2015.
34. On consideration of the evidence, the Tribunal is satisfied regarding the duration of the relationship and the length of time the couple have lived together. The Tribunal is also satisfied that the persons draw on each other for a significant degree of companionship and emotional support, and that they view their relationship as a long term one.
35. Having regard to all the circumstances of the relationship, the Tribunal is satisfied that when the application was made and at the time of this decision, the applicant and sponsor had a mutual commitment to a shared life to the exclusion of others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied the applicant and the sponsor live together.
36. On the basis of the above, the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made and at the time of this decision. Therefore the applicant meets cls.820.211(2)(a) and 820.221.

Are the additional criteria for a de facto relationship met?

37. Persons claiming to be in a de facto relationship and seeking a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application on 18 September 2014, the visa applicant and the sponsor were at least 18 years old.
38. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
39. As stated above, the Tribunal acknowledges that the parties registered their relationship on the City of Melbourne's Relationship Declaration Register on 16 September 2016. However, there is no evidence that the relationship is registered under a relevant State or Territory law or that the sponsor held, holds or is applying for a permanent humanitarian visa, so they must meet the 12 month requirement proscribed at r.2.03A(3).
40. The parties have provided documentation and oral evidence attesting that they commenced their de facto relationship in May 2013 and that they have not lived apart subsequently. Accordingly, the Tribunal is satisfied that the applicant had been in the de facto relationship for at least the 12 month period ending immediately before the date of the application on 18 September 2014, and accordingly satisfies r.2.03A(3).
41. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

42. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211(2)(a) of Schedule 2 to the Regulations;
 - cl.820.221 of Schedule 2 to the Regulations; and
 - r.2.03A

Shane Lucas
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).